

### REMARKS

Claims 1-7 have been rejected under 35 U.S.C. § 103 as being obvious over the German '214 patent in combination with the European '876 patent. Applicant respectfully traverses this rejection, and requests reconsideration of the claims.

Independent claim 1 is directed towards a dishwasher, and requires a disk mounted for rotation about a vertical axis and a water nozzle to direct water horizontally onto the vanes of the disk. Claim 1 further requires that the disk and nozzle are spaced apart. Independent claim 4 is directed towards a water distribution system for a dishwasher, and also requires a rotatable disk and a water nozzle spaced from the disk to direct water transverse to the rotational axis of the disk.

The Examiner acknowledges that the German '214 patent does not disclose a disk and water nozzle that are spaced apart, but suggests that such an arrangement is simply an obvious matter of design choice, citing two old cases (1950 and 1975) from the CCPA. More particularly, the Examiner cites *In re Japikse* for the proposition that shifting the position of a starting switch is an obvious design choice since the shift would not have modified the operation of the device. Applicant notes that in *Japikse*, the claims did not have any limitations regarding spaced apart components, as in claims 1 and 4. Furthermore, the Court did not rely upon "design choice" for rejection of claim 3, but rather relied upon a prior art patent (Cannon) for the rejection. Thus, *Japikse* does not stand for the proposition of a rejection based upon "an obvious matter of design choice", as asserted by the Examiner.

The Examiner cites the 1975 *Kuhle* decision for the proposition that placement of a contact in a conductivity measuring device is an obvious matter of design choice. More accurately, the Court held that the particular placement of the contact provides no novel or

unexpected result, and that it was the manner of contact (rather than the placement) which was found to be an obvious matter of design choice. 526 F.2d at 55 (CCPA 1975). Thus, *Kuhle* does not support the Examiner's conclusion.

Here, the German '214 patent cannot be modified to space the nozzle apart from the rotating disk, as required by claims 1 and 4. As best seen in Figure 3 of the German '214 patent, the disk 10 includes a sloped roof 10 forming a conical structure with the vanes 18 located inside the conical disk. Thus, water directed in a horizontal direction from a nozzle spaced apart from the disk, is required by claim 1, and cannot hit the internal vanes 18 due to the protection of the conical roof of the disk 10. If the nozzle is spaced apart from the disk 10, the only way to hit the vanes 18 of the German '214 patent is to direct the water from below the disk 10 in an upwardly direction. Such an orientation does not meet the limitation of claim 1 for a horizontal water jet, or the requirement of claim 4 that the water jet is directed transverse to the axis of rotation of the disk. Therefore, the modification of the German '214 patent as suggested by the Examiner is either nonfunctional, or does not meet the limitations of claims 1 and 4.

Furthermore, there is no basis in 35 U.S.C. § 103 for a rejection based upon "design choice". Section 103 requires that rejection be based upon the prior art. Even if design choice is a legally proper basis to reject a patent claim, as the CCPA explained in 1970, a rejection of a feature as "an obvious matter of choice" is not convincing in the absence of some reason why a person skilled in the art would find it obvious to depart from the teachings of the prior art. *In re Bezombes*, 164 USPQ 387, 391 (CCPA 1970). As more recently explained by the Federal Circuit, "the mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification." *In re Fritch*, 23 U.S.P.Q.2d 1780, 1783-84 (Fed. Cir. 1992). Here, there is

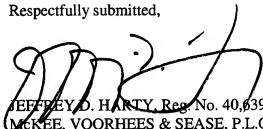
no teaching or suggestion as to why (or how) the German '214 patent would be modified to space the nozzle apart from the disk. Therefore, the Examiner's design choice rejection is improper.

In view of the foregoing, the rejection of the claims 1 and 4 based upon an obvious matter of design choice is fatally defective, and must be withdrawn. Accordingly, Applicant respectfully requests that a Notice of Allowance be issued.

Please consider this a one-month extension of time from December 5, 2006 to January 5, 2007 and charge Deposit Account No. 26-0084 the amount of \$120.00 for this extension. No other fees or extensions of time are believed to be due in connection with this amendment; however, consider this a request for any extension inadvertently omitted, and charge any additional fees to Deposit Account No. 26-0084.

Reconsideration and allowance is respectfully requested.

Respectfully submitted,



JEFFREY D. HARTY, Reg. No. 40,639  
McKEE, VOORHEES & SEASE, P.L.C.  
801 Grand Avenue, Suite 3200  
Des Moines, Iowa 50309-2721  
Phone No: (515) 288-3667  
Fax No: (515) 288-1338  
**CUSTOMER NO: 27139**

Attorneys of Record

- KMH/bjh -